Filed 3/1/10 P. v. Lamb CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. EBONY NICOLE LAMB, Defendant and Appellant.	2d Crim. No. B211468 (Super. Ct. No. BA334046) (Los Angeles County)

Ebony Nicole Lamb appeals from the judgment entered following her conviction by a jury of the second degree robbery of Talaat Boktor. (Pen. Code, §§ 211, 212.5, subd. (c).)[1] The jury found true an allegation that, during the commission of the robbery, a principal had been armed with a firearm. (§ 12022, subd. (a)(1).) The jury acquitted appellant of the second degree robbery of Elisa Siqueira. The trial court sentenced appellant to prison for four years, suspended execution of the sentence, and placed her on formal probation for three years. One of the conditions of her probation was that she serve 180 days in the county jail.

Appellant contends that the trial court erroneously refused to discharge the entire jury panel and to exclude her statements to the police. We disagree. On the other hand, appellant correctly contends, and respondent concedes, that certain conditions of her probation must be modified. We modify these conditions and affirm in all other respects.

[1] All statutory references are to the Penal Code.

Facts

At approximately 8:15 p.m. on December 23, 2007, Elisa Siqueira was working as a valet parking attendant at a restaurant in Hollywood. Sequeira had about $200 in cash, including many one-dollar bills. A man got out of a car with dark-tinted windows and pointed a gun at Siqueira's head. He said, "Give me the money," and Sequira gave him the $200. The man then reentered the car, which immediately "took off."

Geoffrey Shotz, who was leaving the restaurant, saw the man with the gun enter the passenger side of the vehicle. He wrote down the car's license plate number.

At about 9:40 p.m. that same night, Talaat Boktor was working as a valet parking attendant near Hollywood Boulevard. A man driving a silver Nissan with dark-tinted windows asked him how much it would cost to park. When Boktor told him the cost, the driver made a U-turn and parked about three meters away. The driver got out of the vehicle, pointed a gun at Boktor's neck, and demanded his money. Boktor gave the driver about $200. Boktor had an additional $175 in his wallet, and the driver removed the wallet from Boktor's back pocket. The robber then ran back to the silver Nissan, got into the driver's seat, and drove away.

At approximately 11:00 p.m. that same night, appellant was arrested after she had exited a silver Nissan Maxima with the same license plate number as the vehicle used in the robbery of Siqueira. Her purse was searched, and it contained $150 in mostly one-dollar bills.

Following her arrest, appellant was interrogated by Detective Luis Corona. Appellant told Corona that both robberies had been committed by Daveion Johnson while he was a passenger in the car that she had been driving. Appellant claimed that she had not known that Johnson was going to commit the robberies. After the robberies, Johnson allegedly forced appellant to drive away by threatening her with a gun.

Refusal to Discharge the Entire Jury Panel

Facts

During jury selection, juror number 8 confidentially told the court that she had spoken with appellant at approximately 12:25 p.m. during the lunch break. The juror saw

appellant talking on the telephone in the hallway outside the courtroom. Appellant "started crying all of a sudden and she walked to the rest room." When appellant exited the rest room, juror number 8 "offered some comfort" to her. The juror realized only after the break that appellant was the defendant.

The trial court told counsel that it would ask the jurors "if anyone had observed [appellant] doing anything while they were in the hallway." Defense counsel did not object to this procedure. The court then asked the jurors to raise their hands if they had "observe[d] the defendant outside in the hallway doing anything" and "[n]ot just walking by." Several jurors raised their hands. At a "side bar outside of the hearing of the prospective jurors," the court and counsel questioned each of these jurors.

Juror number 4 said that she had seen appellant talking on the telephone and had not heard the conversation. Juror number 6 saw appellant talking to juror number 8. During the conversation, appellant "was crying, wiping her eyes." Juror number 6 could not hear the conversation. She was "shocked" that appellant was talking to a juror. Juror number 12 saw appellant crying as she came out of the bathroom. Appellant sat down next to juror number 12, who "got up and left." Juror number 16 saw appellant crying, "and the first thing that popped into [her] head was it was a tactic." Juror number 20 saw appellant "crying in the bathroom and . . . talking to juror number 8 in the hallway." Juror number 2365 saw appellant "sitting by juror number 8." Juror number 2878 saw appellant talking to another juror. Juror number 3993 saw appellant talking on the telephone and did not hear the conversation.

With the exception of juror numbers 8 and 2365, all of the jurors believed that they could be fair and impartial. Juror number 2365 said that she did not know whether she could be fair and impartial because "it looked sneaky. [Appellant] should have identified herself or something because [juror number 8] . . . obviously had a juror badge on." Juror number 8 said that she could not be fair and impartial for reasons that had nothing to do with her contact with appellant.

After the questioning of the jurors, defense counsel moved to discharge the entire jury panel. Counsel stated, "I think there are enough people who saw something happen

and noticed what happened and there are enough negative comments from several of the people that saw what happened that makes me think at this point that [appellant] is going to be prejudged." The court responded that it would not discharge the entire jury panel, but it would consider discharging certain jurors for cause. The court was "convinced that . . . the whole panel is not tainted." Jurors number 8 and 2365 were subsequently discharged for cause.

Discussion

Appellant contends that, because the entire jury panel "was tainted," the denial of her motion to discharge the panel resulted in the violation of her "right to a fair and impartial jury." "[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*People v. Medina* (1990) 51 Cal.3d 870, 889.) Appellant "cites no case, and we have found none, indicating that such a drastic remedy is appropriate as a matter of course merely because a few prospective jurors" have observed the defendant engaging in improper conduct outside the courtroom. (*Ibid*.) "[D]ischarging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of [particular] venirepersons would be insufficient protection for the defendant. The present case falls short of that mark. We conclude the trial court did not err in declining to discharge the entire venire." (*Ibid*.)

Appellant faults the trial court for failing to make a "sufficient inquiry" of the jurors regarding the incident in the hallway. Appellant contends that "the court was required to interrogate each and every member of the panel, not just those that volunteered, and remove the offending venire persons for the protection of [appellant]." In addition, appellant contends: "The court should have asked the jury if they had spoken about the incident among themselves or with any other juror in order to assess whether the entire jury panel was tainted before denying the defense motion to dismiss the panel."

These contentions are forfeited because appellant did not request that the court conduct further inquiry of the jurors. (*People v. Riggs* (2008) 44 Cal.4th 248, 281 ["To

the extent defendant on appeal contends the trial court erred by not conducting more thorough inquiries of these jurors . . . , he forfeited such a claim of error by failing to raise it below during voir dire, when the trial court could have remedied any alleged inadequacies"].)

In any event, the contentions are without merit. Appellant has not cited any authority requiring that further inquiry be made sua sponte. "In addition, [appellant] has not pointed to any evidence in the record indicating that further questioning would have uncovered any support for a finding that any juror [other than the jurors excused for cause] was, in fact, biased against [her]. [She] therefore has made no showing that the absence of further questioning by the trial court, even if deemed error, was prejudicial." (*People v. Riggs*, *supra*, 44 Cal.4th at p. 281.)

Appellant argues that, by asking the jurors if they had observed appellant "outside in the hallway doing anything" other than "just walking by," the trial court implied "that appellant was doing something wrong." Appellant alleges that the court's question "helped to reinforce the panel's feeling that there had been some wrongdoing by appellant." Thus, "[t]he court's own conduct in asking such a question of the panel tainted it."

If appellant believed that the trial court's question was improper, she should have objected. Appellant forfeited this issue by failing to object. " ' " 'The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.' " ' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) In any event, the question was not improper. It did not reasonably imply that appellant had engaged in wrongdoing.

Refusal to Exclude Appellant's Statements

Facts

Detective Corona interviewed appellant after her arrest. At the beginning of the interview, he said: "There was a series of robberies last night. Okay. Involving you and

your vehicle and two other guys." Appellant responded, "I don't know nothing about no robbery." Corona then advised appellant of her *Miranda* rights,[2] and she stated that she understood them. Corona did not ask appellant whether she wanted to waive her rights. Instead, he said: "You want to tell us about this vehicle you were driving and – some of those questions I'd like to ask you about these robberies?" Appellant responded, "I mean, what you want to ask?" Corona replied: "I'm going to ask you some questions whether – like I said, I don't know. [¶] You're going to tell me. I have some question about your vehicle. Okay." Appellant said, "Okay," and proceeded to answer Corona's questions.

At first, appellant insisted that she "was not driving the vehicle" in question and was unaware of any robberies. She stated: "If someone drove my car, it was with me not knowing." Then she changed her story and said that a person named Daveion Johnson had borrowed her car when the robberies had occurred.

She later changed her story a second time and said that she had driven Johnson to a parking structure in Hollywood. Johnson exited the car and robbed the parking attendant. Appellant heard the parking attendant say: " '[H]e have a gun. He rob me.' " Johnson reentered appellant's vehicle and "told [her] to drive or he was going to shoot [her]." Appellant dropped Johnson off on La Cienega Boulevard and drove away. Only one robbery had occurred.

Finally, appellant changed her story a third time. She said that, after the robbery in Hollywood, Johnson "hopped out" of her car while she was stopped at a red traffic light. Johnson ran across the street, robbed another person, then ran back to her car and "hopped back in . . . and told [her] to drive." Johnson pointed a gun at appellant, who "was just scared for [her] life." .

Motion to Exclude

Defense counsel made an oral, pretrial motion to exclude appellant's statements to Detective Corona. Appellant did not testify at the hearing. The basis for the motion was "that there was not a valid waiver" of appellant's *Miranda* rights. The trial court asked

---

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

counsel to explain what she meant by the absence of a valid waiver. Counsel replied: "He [Corona] does not ask her having these rights in mind do you wish to speak to me now." The trial court ruled: "It appears to me that [appellant] was fully advised of her rights and then chose to speak. . . . I do find there was a valid waiver under *Miranda*."

Appellant contends that she was "incapable of making a knowing and intelligent waiver" of her *Miranda* rights because she "was admittedly under the influence of alcohol and drugs at the time of her interrogation." This contention is forfeited because appellant failed to raise the issue in the trial court. "As a consequence of the issue not having been raised below, 'the parties had no incentive to fully litigate this theory . . . and the trial court had no opportunity to resolve material factual disputes and make necessary factual findings.' [Citation.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 669.)

In any event, the contention is without merit. In support of the contention, appellant notes that, "[d]uring the interview, appellant told Detective Corona that she had been drinking alcohol and smoking marijuana that night." Appellant's statement to Corona is insufficient to establish that she was "incapable of making a knowing and intelligent waiver" of her *Miranda* rights.

Appellant argues that there was no valid waiver of her *Miranda* rights because she "was never asked if she gave up any of her rights." But "a suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision. [Citation.] [Our Supreme Court has] recognized that a valid waiver of *Miranda* rights may be express or implied. [Citations.] A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.] In contrast, an unambiguous request for counsel or refusal to talk bars further questioning. [Citation.] [¶] 'Although there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the

totality of the circumstances surrounding the interrogation. [Citations.]' [Citation.]" (*People v. Hawthorne* (2009) 46 Cal.4th 67, 86.) "On review of a trial court's decision on a *Miranda* issue, we accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 586.)

Exercising our independent review and considering the totality of the circumstances surrounding appellant's interrogation, we conclude that she made a valid, implied waived of her *Miranda* rights. Corona explained her rights in a simple and straightforward manner and gave her an opportunity to invoke them. Appellant acknowledged that she understood her rights, and there is no evidence to the contrary. Appellant told Corona that she had just graduated from college. She said it was "[o]kay" to question her and answered Corona's questions without hesitation or protestation. No evidence was presented that she was reluctant to discuss the incident. She never requested the presence of counsel or attempted to terminate the interrogation. She tried to deceive Corona by initially insisting that she "was not driving the vehicle" in question and did not "know anything about any robbery."

Our conclusion that appellant impliedly waived her *Miranda* rights is supported by *People v. Hawthorne, supra*, 46 Cal.4th 67. In that case the defendant acknowledged that he understood his *Miranda* rights. A detective then asked, " 'Now, uh, why don't you tell me a little bit about how - what happened tonight with this car.' " (*Id*., at p. 85.) The defendant replied, " 'Okay,' " and made statements in response to the ensuing interrogation. (*Ibid*.) Our Supreme Court concluded: "Based on the totality of the circumstances surrounding the interrogation, we find that defendant's willingness to answer questions after expressly affirming his understanding of his *Miranda* rights constituted a valid implied waiver of them. [Citation.] The record reflects that defendant was aware of the rights he was abandoning and of the consequences of his decision, and voluntarily waived his rights with the intention of deceiving the officers." (*Id*., at pp. 87-88.)

In addition to claiming that there was no valid waiver of her *Miranda* rights, appellant argues that her statements to Corona were involuntary. But appellant failed to raise this issue in the trial court. "Accordingly, the claim of involuntariness of [appellant's] statements . . . is not preserved for appeal. [Citations.]" (*People v. Cruz, supra,* 44 Cal.4th at p. 669.)

Appellant also claims that the trial court erred in failing to exclude her statements to Detective Corona's before he advised her of her *Miranda* rights. This issue is forfeited because appellant failed to raise it in the trial court. (*People v. Cruz, supra*, 44 Cal.4th at p. 669.) Moreover, any error in not excluding these statements was harmless beyond a reasonable doubt. Prior to the reading of her *Miranda* rights, appellant denied knowing anything about the robbery. After impliedly waiving her rights, appellant at first reiterated this denial: "I was not driving the vehicle. I don't know anything about any robbery."

Conditions of Probation

The minute order of the sentencing hearing shows a condition of probation not mentioned in the probation report and not included in the trial court's pronouncement of judgment: "Do not appear at any court proceeding at which a gang member is a defendant unless you are a co-defendant or subpoenaed as a witness." Respondent concedes that the minute order must be amended to delete this condition. We accept the concession. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 387 ["The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order"].)

Both parties take issue with the following probation condition imposed by the trial court: "Do not own, possess or wear any criminal street gang paraphernalia or exhibit any additional criminal street gang affiliation, including but not limited to dressing in, displaying or wearing any clothing, colors or other insignia associated with any criminal street gang or making, displaying, using or flashing any hand signs or signals associated with any criminal street gang." Respondent concedes "that this condition is unconstitutionally vague and overbroad because it does not require knowledge of the

gang affiliation." Appellant argues that "[t]his condition should be either stricken . . . or the judgment should be modified to include knowledge."

The parties are correct. In *In re Justin S.* (2001) 93 Cal.App.4th 811, 816, the court concluded that a condition of probation "[p]rohibiting association with gang members without restricting the prohibition to *known* gang members is ' "a classic case of vagueness" ' [citation]" and " 'suffers from constitutionally fatal overbreadth.' [Citation.]" (See also *In re Sheena K.* (2007) 40 Cal.4th 875, 880, 891 [probation condition requiring "that defendant not 'associate with anyone disapproved of by probation' " was unconstitutionally vague "in the absence of an express requirement of knowledge"].) The *Justin S.* court decided: "The appropriate remedy is to modify the condition . . . to narrow its reference to persons known to the probationer to be associated with a gang. [Citations.]" (*In re Justin S., supra,* 93 Cal.App.4th at 816, fn. omitted; see also *In re Sheena K., supra,* 40 Cal.4th at p. 892 ["modification to impose an explicit knowledge requirement is necessary to render the condition constitutional"].) A similar modification must be made here.

Disposition

The judgment is modified to strike the following condition of probation from the minute order of the sentencing hearing: "Do not appear at any court proceeding at which a gang member is a defendant unless you are a co-defendant or subpoenaed as a witness." In addition, the probation condition stating, "Do not own, possess or wear any criminal street gang paraphernalia or exhibit any additional criminal street gang affiliation, including but not limited to dressing in, displaying or wearing any clothing, colors or other insignia associated with any criminal street gang or making, displaying, using or flashing any hand signs or signals associated with any criminal street gang," is modified to read: "Do not *knowingly* own, possess or wear any criminal street gang paraphernalia or exhibit any additional criminal street gang affiliation, including but not limited to dressing in, displaying or wearing any clothing, colors or other insignia associated with any criminal street gang or making, displaying, using or flashing any hand signs or signals associated with any criminal street gang." In all other respects, the judgment is

affirmed. The trial court is directed to prepare an amended minute order of the sentencing hearing showing these modifications and to forward a copy to the probation authorities.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Charles F. Palmer, Judge

Superior Court County of Los Angeles

_____

David B. Chatfield, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Catherine Okawa Kohm, Deputy Attorney General, for Plaintiff and Respondent.